THE LAW OF THE ELECTORAL COUNT.

THE most complicated bit of governmental machinery which the modern world has to exhibit is that which is employed in the selection of the chief executive officer and his possible substitute for the United States. A glance at the constitutional and statutory provisions governing this subject will reveal the fact that, from the single standpoint of the powers conspiring to produce the result, at least seven distinctions must be made in the procedure:

(1) The constitution itself prescribes in detail a certain part of the process.[1]

(2) The constitution commands the Congress (or one House or some officer thereof) to execute a certain other part of the process.[2]

(3) The constitution orders the states to carry out a certain other part of the process.[3]

(4) The constitution authorizes the Congress (or leaves it to the Congress) to execute (or provide for the execution of) still another part of the process.[4]

(5) The constitution authorizes (or leaves it to) the states to provide for and execute still another part of the process.[5]

(6) The Congress has laid certain duties upon the states (or an officer thereof) in the execution of another part of the process.[6]

(7) The Congress has conferred certain powers upon the states to provide for still another part of the process.[7]

It is almost marvellous that any people should have preserved political unity for a century under such a loose and decentralized system of election of its chief magistrate. It is certainly

[1] Art. 2, secs. 2 & 4; art. 12, secs. 1 & 2.
[2] Art. 12, secs. 1 & 2.
[3] Art. 2, sec. 2.
[4] Art. 1, sec. 8, § 18; art. 2, sec. 4; art. 12, sec. 1.
[5] Art. 2, sec. 2.
[6] U. S. Statutes at Large, vol. 24, chap. 90, sec. 3, p. 373.
[7] U. S. Revised Statutes, secs. 133, 134.

an indubitable evidence of great popular self-control; especially when we consider that neither the Congress nor the states have, until very recently, worked out with any degree of fulness and precision the parts of the electoral process assigned to them (or left to them) by the constitution. In fact, our jurists and statesmen have greatly disagreed and do still greatly disagree as to what the constitution does assign or leave to the Congress on the one hand and to the states upon the other. At last, however, the view seems to have prevailed that what the constitution does not itself regulate, or order or authorize the Federal government or some branch thereof to regulate, or order the states to regulate, or authorize the Federal government to order the states to regulate, is left to the states in full discretion; and that what the constitution authorizes the Federal government to regulate, without designating which branch thereof is thus empowered, is to be regulated by the usual course of legislation, *i.e.* by an act passed by both Houses of the Congress and approved by the President or, if not approved by the President, repassed by a two-thirds majority of each House. These are the principles upon which the Electoral Count law[1] of February 3, 1887, rests, whose provisions it is the purpose of this paper briefly to explain.

The first section of the law changes the day for the meeting of the electors and the giving of their votes from the first Wednesday in December succeeding their appointment to the second Monday in January succeeding their appointment. The reason for this change becomes obvious upon reading the second section of the law. It is to give the states ample time for determining any dispute concerning the election of its electors or any of them before the day appointed for their meeting and voting. There is no question that Congress has the constitutional power to make this change. The fourth section of the second article of the constitution expressly confers it. There is, furthermore, no question about the wisdom of this change, viewed from the standpoint of the principle of the law, that the states should, if possible, determine finally all questions relating to the election of the electors.

[1] U. S. Statutes at Large, vol. 24, chap. 90, pp. 373 *et seq.*

The second section of the law is the groundwork, so to speak, of the whole system of the count. It is, however, curiously couched in hypothetical language. It reads:

That if any state shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such state, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to the said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such state is concerned.

This language reveals at the outset an excessively states-rights view of the whole subject. It will be seen that the Congress does not command the states to provide for a determination of the controversies or contests that may arise concerning the appointment of the electors, does not even declare it to be the duty of the states to do so, but simply holds out an inducement for them so to act. The precursors of this law, the bills passed by the Senate in the forty-seventh and forty-eighth Congresses, expressed this clause in a little different language. They read:

That each state may, pursuant to its laws existing on the day fixed for the appointment of the electors, try and determine, *etc.*[1]

This form of words was at once resented by the leaders of the majority in the House. Mr. Eaton, the chairman of the House committee to whom the Senate bill had been referred, denounced most vigorously this mild little word "may" as containing a most violent encroachment by the Congress upon the rights of the states.

Now, by what authority [he exclaimed] does this Congress undertake to tell your state, my friend, how it shall choose its electors and determine whether they are electors or not? By what authority does this Con-

[1] *Congressional Record*, vol. 13, p. 859; vol. 15, p. 5076.

gress undertake to legislate for New York and Alabama and Louisiana and Connecticut and Maryland in a matter that belongs alone to New York and to Maryland and to Connecticut and to Alabama and to each and every of the other states? The constitution says so? Now, let us look at it. See how easy it is for distinguished gentlemen to fall into mistakes. I read from article 2, section 2: "Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the Congress; but no senator," *etc.* Now, that is the constitutional law. But that is not all of it. Turn over to paragraph 3 of the same section and what do you find there? The only power that Congress has is here: "The Congress" — may do what? After the state has done its duty, "The Congress may determine" — what? "The time of choosing the electors and the day on which they shall give their votes; which day shall be the same throughout the United States." That is all the power. The very keeping of that power excludes every other idea of power. Every other idea of power belongs to the states, is in the states. And yet the Senate have given us a bill here in which they undertake to determine, with regard to the electors of states, who are properly elected, which is the duty of the state under the constitution.[1]

It was to no purpose that Mr. Browne reminded Mr. Eaton that this section of the Senate bill did nothing more than declare what evidence the Congress would receive as *conclusive* of the fact of the selection of particular electors by the state.[2] Mr. Eaton insisted upon his view of the subject and the House followed him. In the substitute which he offered for the Senate bill this section was entirely stricken out.[3] This substitute was passed by the House June 24, 1884,[4] and transmitted to the Senate. The Senate rejected the substitute and proposed a conference, which was accepted by the House. The committees of conference failed however to agree,[5] and the bill fell through. When it reappeared in the Senate of the forty-ninth Congress, this section which had so offended the states-rights sensitiveness of the majority of the House was expressed in the hypothetical language above cited.[6] Still the particularists were not satisfied. The provision required that the determination of the

[1] *Congressional Record*, vol. 15, p. 5078. [2] *Ibid.* [3] *Ibid.*, vol. 15, p. 5076.
[4] *Ibid.*, vol. 15, p. 5551. [5] *Ibid.*, vol. 16, p. 1618. [6] *Ibid.*, vol. 17, p. 2387.

controversy or contest should be made at least six days before the day fixed for the meeting of the electors and should be made according to laws enacted prior to, and in force upon, the day fixed for the appointment of the electors. When this new bill reached the House at the beginning of the second session of the forty-ninth Congress, Mr. Dibble attacked this clause and declared that up to "the day when the electors are to cast their votes, the state power as to appointment cannot be interfered with in any manner, shape or form by the Congress of the United States, or by any other power."[1] The majority of the House was however finally made to comprehend that this provision was no interference by Congress with the right of the states to appoint their electors in such manner as they might determine, but was only a notice to the states as to what evidence Congress would accept from a state as *conclusive* in case a contest should arise in that body concerning the counting of the electoral vote of a state.

Regarded from a purely scientific standpoint, one must consider the provision to be still an ultra and an unwise concession of power to the states. No determination which a state can produce should be made *conclusive* against the judgment of both Houses of Congress in the counting of the electoral vote. In matters like this, the concurrent judgment of the two Houses of the Congress is the surest interpretation of justice and right which our political system affords; and the claim that they have no constitutional right to determine the legal genuineness of any electoral vote sent to them under any form of certification by any state, on the ground that the constitution vests the appointment of the electors wholly in the state, confounds the process of the appointment or election with that of the count, and seeks to rob the power of counting of its most important element, *viz.*, the power of ascertaining what is to be counted. The constitution either vests in Congress the power to count the electoral vote or the power to provide by legislation for counting it. If the former alternative is true, then Congress cannot by legislation divest itself of the power of ascertaining and determining

[1] *Ibid.*, vol. 18, p. 46.

what is to be regarded as the true electoral vote of a state. If the latter alternative is true, then Congress may indeed by legislation designate a state tribunal or authority and vest the same with the power to determine, in first and last instance, all controversies and contests in regard to the appointment of electors; but it would be most unwise to do so. Such a rule must be grounded upon the supposition that only the state in which the controversy or contest occurs has any important interest in its determination. It is the same sort of folly that was contained in the compromise measures of 1850, when it was imagined that the slavery question could be put to rest by putting its discussion out of the Congress.

The great majority of the supporters of this law in both Houses of the Congress based their action upon the principle that the two Houses of the Congress, acting concurrently, were by the constitution vested with the power of counting the electoral vote. If this be the true principle, then the position taken by Mr. Adams in the House must be regarded as sound, *viz.*, that Congress cannot by legislation relieve the two Houses of a duty imposed upon them by the constitution; that the utmost that the Congress can do by legislation, under this view of the constitution, is to provide for the case of a disagreement between the two Houses.[1] We cannot go skipping about from article 1, section 8, paragraph 18, to article 12, section 1, undertaking to apply them both to the same subject or to the same parts of the same subject. The two provisions require a different action on the part of the Congress and cannot be employed indiscriminately. The Senate sought to defend itself against the idea, which prevailed largely in the House, that Congress could by law vest the counting of the electoral votes in a consolidated assembly consisting of the members of the two Houses voting per capita, by holding that the constitution imposed the duty of counting upon the two Houses acting separately and concurrently; and yet the Senate passed this bill, which (as to this section) can only be justified upon the ground that the constitution vests in Congress the right to provide by law for the

[1] *Congressional Record*, vol. 18, p. 52.

counting of the vote, but does not impose the duty of counting immediately upon the two Houses themselves. Surely we discover here some of the confusing effects of the experiences of "'77" upon the consciences of those to whom the people have a right to look for the preservation of all the powers conferred by the constitution upon the general government.

The next section of the law, the third, provides for making officially known to the United States government and to the general public the procedures in the states in the choice of the electors and in the determination of any controversies or contests thereover which shall have arisen, and for the certification to the persons chosen of their electoral authority. It makes it the duty of the executive of each state to transmit, under the seal of the state, to the secretary of state of the United States, so soon as practicable after the conclusion of any of these procedures, full information in regard to the same. The certificate of ascertainment of the electors appointed must contain "the names of such electors and the canvass or other ascertainment, under the laws of such state, of the number of votes given or cast for such person for whose appointment any and all votes have been given or cast."[1] The certificate of determination of any controversy or contest must contain an account of the same "in the form and manner as the same shall have been made."[2] The secretary of state of the United States is required to publish in full any and all of such certificates, so soon as practicable after their receipt, in such public newspaper as he shall designate; and at the first meeting of Congress thereafter to transmit to the two Houses of Congress full copies of all such certificates.[3] In the second place, this section of the law requires the executive of the state to deliver, under seal of the state, to the persons chosen electors of the state, on or before the day upon which they are required to meet, three copies of the certificate of ascertainment above mentioned, which the electors shall inclose with the votes given by them for President and Vice-President, and transmit to the seat of government at the same time and in the same manner

[1] U. S. Statutes at Large, vol. 24, chap. 90, sec. 3, p. 373. [2] *Ibid.* [3] *Ibid.*

as is provided by law for the transmission by them of the lists of all persons voted for as President and as Vice-President. The provision of existing law here referred to is section 140 of the Revised Statutes of the United States, which reads:

> The electors shall dispose of the certificates thus made by them in the following manner:
>
> *One.* They shall, by writing under their hands, or under the hands of a majority of them, appoint a person to take charge of and deliver to the president of the Senate, at the seat of government, before the first Wednesday in January then next ensuing, one of these certificates.
>
> *Two.* They shall forthwith forward by the post-office to the president of the Senate, at the seat of government, one other of the certificates.
>
> *Three.* They shall forthwith cause the other of the certificates to be delivered to the judge of that district in which the electors shall assemble.

It will be seen that the new law thus orders the certificates of ascertainment, furnished by the state executive to the electors, and the lists of the electoral votes cast by them, to be transmitted to the seat of government before the first Wednesday in January; while by the first section of the new law, as we have seen, the electors do not meet and give their votes for President and Vice-President until the second Monday of January. Moreover the language of the new law does not inform us whether one of these certificates with one of these lists of the electoral votes is to be left with the district judge. These oversights have apparently just been discovered by our national legislators. A supplementary act was rushed through the Congress during the last days of the session just ended, and approved by the President October 19 (1888), which provides:

> That the certificates and lists of votes for President and Vice-President of the United States, mentioned in chapter one of title three of the Revised Statutes of the United States, and in the act to which this is a supplement, shall be forwarded in the manner therein provided, to the president of the Senate forthwith after the second Monday in January, on which the electors shall give their votes.
>
> That section 141 of the Revised Statutes of the United States is hereby so amended as to read as follows: Whenever a certificate of

votes from any state has not been received at the seat of government on the fourth Monday of the month of January in which their [*i.e.*, the electors'] meeting shall have been held, the secretary of state shall send a special messenger to the district judge in whose custody one certificate of the votes from that state has been lodged, and such judge shall forthwith transmit that list to the seat of government.

That provision of the law (in the fourth section) which refers to the transmission of certificates from the executive of the state to the secretary of state of the United States was not contained in the bill when it appeared in the Senate at the beginning of the forty-ninth Congress, but was introduced into it as an amendment at the instigation of Mr. Evarts.[1] It is well enough, but it loses the greater part of its significance and value if the determinations made by the state are to be conclusive upon the Congress. The less time the Congress has to ruminate upon these certificates the better, if they cannot be set aside.

If the power of Congress to impose duties upon the executives of the states had been a new question at the time of the enactment of this law, I think (judging from the expressions of many members of the House) that a strong resistance to this part of the provision would have been developed; but, thanks to a kindly fate, it was asserted as far back as 1792, when men sat in both Houses of the Congress who knew what the constitution meant,[2] and were disposed to execute it.

The first three sections of the law are thus directed to the regulation of the preliminaries to the count. The fourth provides for the actual process.

(1) It fixes the time of the meeting of the Congress for the count at one o'clock P.M. on the second Wednesday in February succeeding the meeting of the electors. (2) It designates the place as the hall of the House of Representatives. (3) It ordains that the bureau of organization shall consist of the president of the Senate as the presiding officer and four tellers, two appointed by each of the Houses previous to their joint

[1] *Congressional Record*, vol. 17, pp. 1057, 1759.

[2] U. S. Statutes at Large, vol. 1, chap. 8, sec. 3, p. 240.

meeting. (4) It orders that the president of the Senate shall open all certificates and papers purporting to be certificates in the alphabetical order of the states, beginning with the letter A, and shall hand them to the tellers; (5) that the tellers shall read the same in the presence and hearing of the two Houses; and (6) that upon the reading of any such paper the president of the Senate shall call for objections, if any. (7) It provides that all objections shall be made in writing, shall state clearly and concisely and without argument the ground thereof, and, in order to be received, must be signed by at least one member from each House. (8) It commands that, after all objections so made to any vote or paper from a state shall have been received and read, the Senate shall thereupon withdraw from the hall of the House of Representatives and, in separate meeting, consider and decide upon the received objections; and that the House of Representatives shall likewise, in separate meeting, consider and decide upon the received objections. (9) It orders that, when the two Houses have voted upon the question or questions contained in the received objections, they shall immediately meet, and the presiding officer shall then announce the decision of the questions submitted. (10) It prescribes that no electoral vote or votes from any state from which *but one* return has been received shall be rejected, provided the same shall have been given by electors whose appointment has been certified to in the manner prescribed in section 3, above explained, and provided the votes given by such electors shall have been *regularly* given; but that in case both Houses of the Congress shall have decided, by separate vote, that the electors making the return have not received the lawful certification prescribed in section 3, or have not given their vote or votes for President and Vice-President *regularly*, then such vote or votes may be rejected by the concurrent resolution of the two Houses. (11) It prescribes that, in case *more than one* return or paper purporting to be a return shall have been received from a state by the president of the Senate, and a determination as to who are the true electors of the state shall have been reached by an authority or tribunal within the state, as

described in section 2 of this act, then that return shall be received and the votes contained therein counted which have been given by those electors, or their lawful substitutes or successors, whom such determination shows to have been appointed; provided the votes of these electors for President and Vice-President shall have been *regularly* given. It is not expressly stated in this period of the section that, if the two Houses in separate assembly decide that such electors have not given their votes regularly, they may by concurrent action reject these votes, though it is to be presumed that such is the meaning of the law. The language of this paragraph is very confused, almost unintelligible; and since we have as yet had no actual precedents of interpretation, there are several points concerning which our predications cannot claim the attribute of certainty. (12) It prescribes that in case more than one return or paper purporting to be a return shall have been received from a state by the president of the Senate, and conflicting determinations as to who are the true electors of the state shall have been made by different authorities or tribunals within the state, each claiming to be the true authority or tribunal, as described by section 2 of this act, then the two Houses of the Congress, acting in separate assembly, may by concurrent agreement determine which are the true and legal electors of the state; but if they disagree as to this, then the vote of the state shall not be counted. Here again it is not expressly stated that, if they agree upon the persons to be regarded as the lawful electors of the state *and also* agree that they have not given their votes regularly, they may by concurrent resolution refuse to count the vote of the state, though this is again to be inferred. (13) It prescribes that in case more than one return or paper purporting to be a return shall have been received from a state by the president of the Senate, and no determination as to who are the electors of the state shall have been made in the state as provided in section 2 of this act, but one set of the electors making a return of the electoral votes of the state shall have the certificate of the executive of the state, under the seal thereof, to their appointment, then the

votes given by such electors shall be counted, unless the two Houses in separate assembly decide by concurrent resolution that such electors are not the lawful electors of the state or have not given their votes regularly or lawfully for President and Vice-President. In this case the two Houses may, further more, by concurrent resolution declare the electors not furnished with the certificate of the executive of the state to their appointment, to be the true and lawful electors of the state, and the votes of such electors must be counted unless the two Houses concurrently resolve that these electors have not given their votes *regularly* for President and Vice-President and decide concurrently to reject them. (14) It prescribes that in case more than one return or paper purporting to be a return shall have been received from a state, by the president of the Senate, and no determination as to who are the electors of the state shall have been made in the state as provided in section 2 of this act, and neither set of the electors making returns shall be furnished with the certificate of the executive of the state to their appointment, then the two Houses may, acting separately, by concurrent resolution determine who are the lawful electors of the state, and the votes of such electors shall be counted unless the two Houses by concurrent resolution decide that such electors have not given their votes regularly or lawfully for President and Vice-President and resolve to reject the same. If, in this case, the two Houses cannot agree as to who are the lawful electors of the state, no vote or votes from the state can be counted. (15) Lastly, it commands that the tellers shall make lists of the votes as they shall appear from the certificates as opened by the president of the Senate, when no objections are made, and as they shall appear from the decisions of the two Houses made according to this law and announced by the presiding officer upon reunion of the two Houses, when objections have been duly raised; and that the votes, having been ascertained and counted in the manner and according to the rules provided in this act, shall be delivered to the president of the Senate, who shall thereupon announce the state of the vote, which announcement shall be

deemed a sufficient declaration of the persons, if any, elected President and Vice-President, and together with a list of the votes shall be entered on the journals of the two Houses.

The first thing which strikes the uninitiated reader of this section as strange and peculiar is the apparently changeable organization of the Congress when counting the electoral vote, and when hearing it counted. Apparently, when listening to the count, Congress is a joint national assembly, consisting of the members of the two Houses. One person is made the presiding officer. He is called sometimes the president of the Senate, but sometimes also simply the presiding officer. He is vested with the power to keep order in the united assembly, and he reads the decisions (upon objections to votes) which both the House of Representatives and the Senate make in separate assembly. On the other hand, so soon as the passive state is laid aside and the active assumed, this apparently simple body becomes two bodies with independent and possibly conflicting wills and organs. I know of nothing in nature to which one may liken this strange organization, except the Siamese twins; and I marvel that it has not yet obtained the convenient and perfectly descriptive epithet of the Eng and Chang Congress. This monstrosity is the product of two principles of constitutional law belonging to different genera. The one is the proposition that the constitution itself provides for the counting of the electoral vote; and the other is that the constitution vests in Congress the power to provide by legislation for the count of the vote. The first proposition, although Senator Sherman [1] gave the great weight of his opinion against it, was supported by the Senate as its defence against the tendency of the House to organize, by legislation, a single body for counting the electoral vote, consisting of the members of the two Houses, in which the senators would be overwhelmed by the far more numerous representatives. The second proposition was held by a large party in the House, large enough to carry through the House in the forty-eighth Congress a bill to constitute the two Houses a joint convention to count the electoral vote; [2] although during the course of the debate upon the

[1] *Congressional Record*, vol. 17, p. 817. [2] *Ibid.*, vol. 15, pp. 5076 and 5557.

bill both Mr. Eaton and Mr. Pryor abandoned their own constitutional ground, and undertook to turn the argument of the Senate against itself by occupying the Senate's position. Mr. Eaton declared that in his opinion the constitution vests in the House of Representatives the power to count the electoral vote in case of dispute,[1] and Mr. Pryor asserted that the constitution creates a joint convention of the two Houses for this purpose.[2] The only wonder is that we did not get a set of articulated triplets, instead of twins, out of this miscegenation of parent ideas.

It seems to me that the constitutional principle upon which the House bill rested is the true one, *viz.*, that the constitution does not itself expressly provide for deciding disputes in regard to the counting of the electoral votes, but vests in Congress the power to provide for the case by legislation. Article 1, section 8, paragraph 18, reads:

> The Congress shall have power . . . to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

This was the view taken by Senator Sherman. Senator Garland also declared that in his opinion the constitution does not specifically and expressly provide for determining disputes in regard to the count of the electoral votes;[3] but his extreme states-rights political science would not permit him to accept the doctrine that the constitution generally and impliedly vests in the Congress the power of making provision for their determination. His view was that what is not to be found specifically and expressly in the constitution must be put there by constitutional amendment. This has an honest ring, but with our present method of amending the constitution it simply means stagnation. It simply means that our public law shall never keep pace with the developments and requirements of our political science. It means the accumulation of error until

[1] *Congressional Record*, vol. 15, p. 5548. [2] *Ibid.*, vol. 15, p. 5102.
[3] *Ibid.*, vol. 13, p. 2648.

nothing short of revolution can correct it. It means the congestion of the body politic until nothing but blood-letting can relieve it. It is therefore the *petite morale* over against the *grande morale.* His brethren in the House certainly manifested greater statesmanship than he upon this subject. His first proposition is, however, undoubtedly true, *viz.*, that the constitution does not specifically and expressly provide for determining the conflicts over the electoral returns. It is certainly impossible that the framers of the constitution could have provided expressly and specifically for the determination of disputes the causes of whose origin they could not have foreseen, and to attribute such prescience to them is nothing but chauvinistic piety. We all know that while the form of the electoral system which they created remains, the substance of it has become completely changed, and that it is from this change that these disputes and controversies arise. The framers of the constitution undoubtedly meant that the president of the Senate should count the electoral votes, but in making the count they did not think of anything more than mere enumeration. They did not think of his ever being placed under the necessity of ascertaining what should be counted. They were, however, wise enough to know that they could not foresee all things, and therefore they wrote in the constitution that Congress should have power to make all laws necessary and proper to carry into execution all powers vested by the constitution in the government of the United States or in any department *or officer thereof.* A sound interpretation of this clause cannot fail to accord to the Congress the power to make laws for carrying into execution this general and undefined power of the president of the Senate to count the electoral votes. Congress may therefore, by a law, create any tribunal it will for the determination of controversies and conflicts in the counting of the electoral votes and make such determinations binding upon the president of the Senate in the enumeration of the votes.[1] Whether that tribunal shall be the two Houses of Congress acting independently, or a convention composed of the members of the two Houses of Con-

[1] Kent's Commentaries (12th edition), vol. 1, p. 295.

gress or an equal number of representatives from the two Houses, or a court already in existence or created for the purpose, or any other body, — Congress may, nay, must determine by an act of legislation. It is only a question of practical politics, and not at all of constitutional powers.

The failure of the Senate to comprehend, or its determination to ignore, this view (and I think it was the latter) is what has produced the mixed and confused methods and procedures provided in this fourth section of the law under our consideration.

When we come to examine these provisions in detail, we find several measures of very questionable wisdom and several points still left unsettled.

(1) The rule that the determinations made by a state tribunal or authority in regard to controversies and contests concerning the appointment of electors cannot be reversed by the concurrent acts of the two Houses appears to me to be an unwise measure. I have already criticised this provision under the review of the second section (pages 637, 638).

(2) The rule that no electoral vote or votes from any state from which but one lawful return has been received shall be rejected seems to me to surrender too far the control of Congress over the counting of the vote. It is altogether conceivable that a state may make but one return, and yet that, in the election of the electors who sign the same, notorious fraud and terrorism may have carried the day. This rule cannot be justified except upon the principles that the purity of presidential elections is matter solely or at least chiefly of state concern, and that the state consciousness of right and wrong in reference to this subject is rather to be trusted than the national. It seems to me that such principles need only to be stated to be rejected. The constitution expressly provides a grave penalty for any such procedures within a state, and imposes upon Congress the duty of securing the execution of the same.[1] When the bill went from the Senate to the House it contained the proper modification of this rule. It provided that the concurrent act of the two Houses should prevail against a single return,[2] but the House struck out

[1] Art. 14, sec. 2.

[2] *Congressional Record*, vol. 18, p. 29.

the modification and insisted upon the amendment as one of the indispensable conditions of its agreement to the bill.[1] It will be remarked, however, in connection with this provision, as with the previous one, that the law authorizes the two Houses by concurrent resolution to reject the votes of the electors for President and Vice-President if they agree that these have not been *regularly* given; *i.e.*, the two Houses cannot reject the return on account of fraud or defect in the election of the electors or in the determination of a controversy thereover, but may do so on account of irregular action on the part of the electors themselves in giving their votes for President and Vice-President. It leaves the power implicitly in the two Houses by concurrent resolution to determine wherein irregularity shall consist. This distinction is certainly a valuable one. It would be an unendurable surrender of the powers of Congress so to bind the two Houses that they could not by concurrent act prevent, for example, the electors from choosing a person for the presidency who should not have the qualifications for the office prescribed in the constitution.

(3) The rule that, in case of conflicting returns and no determination made by the state according to the provisions of section 2 of the act, the certificate of the state executive shall be held conclusive as to who are the true electors of the state, unless the two Houses shall by concurrent act resolve the contrary, is too liable to abuse. It gives too much power over the presidential election into the hands of the state executive. He could easily procure the transmission of conflicting returns and then, in case of a difference of view in the two Houses, determine between them as to which should be received. The state executives have not shown themselves sufficiently immaculate to be intrusted with powers so easy of manipulation. This provision did not exist in the bill as it went from the Senate to the House, but was introduced as an amendment by the House and made another *conditio sine qua non* of its acceptance of the bill at all.[2]

(4) The rule which allows either House, in case of two or

[1] *Ibid.*, vol. 18, p. 77.

[2] *Ibid.*, vol. 18, pp. 30, 49, 77.

more returns made by two or more sets of electors, each authorized by determinations made professedly in accordance with the second section of the act, to reject the vote of the state, is one of doubtful wisdom. When the bill was in the Senate, Mr. Evarts pointed out the fact that this provision would inure to the undue advantage of the House whenever the loss of the vote of the state affected the election, since the House could, by throwing out the vote of the state, bring the election into its own hands.[1] This condition of things could easily be manufactured, of course; and a House so disposed could easily be enabled to defeat an election by the electors and substitute its own choice therefor. Mr. Hoar suggested that this could not happen, since, if the votes from a state should be thrown out, they must be deducted from the whole number of electoral votes in calculating the majority necessary to a choice. The result of this might be the election of the other candidate by the electors, but it could not be to bring the election into the House of Representatives.[2] But the assertion of Mr. Hoar that, when the votes of a state are thrown out, they are to be deducted from the whole number of the electoral votes in calculating the majority necessary for a choice was not at the moment, and is not now, the fixed and certain law of the land. It was only his conjecture, while Mr. Evarts, an equally weighty authority in the interpretation of constitutional law, held, as we have seen, the contrary view. Mr. Morgan suggested that the House might be deterred from such an act by the fact that the members from one more than one-third of the states can, under the constitution, prevent a quorum for the election of the President from assembling, which would result in making the person chosen by the Senate as Vice-President, the President.[3] But this again is crude. The constitution provides that a quorum of the House of Representatives to elect a President shall consist of members *or a member* from two-thirds of the states.[4] Practically no Congress would be so constituted as to party affiliations that all the members from one more than one-third of the states

[1] *Congressional Record*, vol. 17, p. 820.
[2] *Ibid.*, vol. 17, p. 821.
[3] *Ibid.*, vol. 17, p. 867.
[4] Art. 12, sec. 1.

would be opposed to a majority of the members from each of one less than two-thirds of the states. The criticism upon this case will apply equally to the case where either House may prevent the counting of the vote of a state from which several returns have been presented, when no determination has been made in the state according to section 2 of this act, and neither set of the electors making returns is furnished with the certificate of the executive of the state concerned.

(5) The law fails to cover at least two points. It does not provide for the case where two persons, each claiming to be the true executive of the same state, issue certificates to different sets of electors, and no determination according to section 2 of the act shall have been made in the state. The analogies of the cases provided for would lead us to infer that the vote of the state should be rejected unless the two Houses acting separately could agree as to which return should be counted; but this is only conjecture. Furthermore, no provision is made in the law as to whether, when the vote of a state is rejected, it is to be deducted from the whole number of electoral votes to which all the states are entitled, in determining the majority necessary to choose the President. The constitution declares that the majority necessary to elect shall be that of the whole number of electors appointed.[1] If, when the vote of a state is rejected, it is to be assumed that the state has not appointed any electors, then it would seem that such state should not be regarded in computing the majority necessary to a choice; but this again is conjecture. When two such able lawyers as Senators Evarts and Hoar disagree, as I have pointed out above, in regard to this matter, it certainly is to be concluded that there is necessity for greater clearness and exactness upon this point.

The last three sections of the law, the fifth, sixth and seventh, prescribe rules of procedure in the joint meeting and in the separate meetings of the two Houses. The purpose of these is to prevent the protraction of the count beyond the day for the inauguration of the new President, *i.e.*, to prevent interreg-

[1] Art. 12, sec. 1.

num. They ordain that, in the joint meeting, the president of the Senate shall have power to preserve order, and no debate shall be allowed and no question shall be put by the presiding officer except to either House on a motion to withdraw; that such joint meeting shall not be dissolved until the count of electoral votes shall be completed and the results declared; that when the two Houses separate to decide upon an objection that may have been made to the counting of any electoral vote or votes from any state, or other question arising in the matter, either House may direct a recess until ten o'clock A.M. of the next calendar day, Sunday not counted, but if the counting of the electoral vote and the declaration of the result shall not have been completed before the fifth calendar day next after the first meeting of the two Houses, no further or other recess shall be taken by either House; that, in the separate meetings of the two Houses, each senator and each representative may speak to the objection or question not more than once and for not longer than five minutes, and that such debate shall not be permitted for a longer time than two hours, upon the expiration of which time it shall be the duty of the presiding officer of each House to put the main question without further debate. There is also provision for the seating of the two Houses and their officers, which need not be recited for our purpose.

These regulations are apparently exhaustive. So far as human wit can divine, they will probably prevent any failure of the Congress to reach its decision in regard to the counting of the electoral votes before the expiration of the existing presidential term, *i.e.*, they will remove this possibility of interregnum which, in one case at least, seriously threatened to occur.

There is no doubt that the law disposes, in a complex and clumsy way indeed, of some of the difficulties in the counting of the electoral votes. It is not quite so bad as represented by one member of the House, who said, if I remember correctly, that if, considering the period of its incubation and the labor with which it had been brought forth, he should apply to it the old Horatian line, "*parturiunt montes, nascitur ridiculus mus*," he thought he should be doing grave injustice to the mouse. But

it cannot be regarded as a solution in principle of this great question. It is a makeshift, at best a compromise. Senator Hoar himself, who, with Senator Edmunds, may be regarded as the originator of this law, conceded that a perfect regulation of this subject would require a common arbiter between the two Houses of the Congress and agreed that the constitution confers upon the Congress the power to establish such an one by law; but he cited the failure of all attempts as yet made upon that line and concluded that practically it is impossible to secure any such provision.[1] The truth is, we want a new baptism of nationalism all around. Let us hope that it will not again be one of fire.

JOHN W. BURGESS.

[1] *Congressional Record*, vol. 17, p. 1020.